STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from Michigan Court Of Appeals
Hon. M.J. Kelly, P.J., Wilder, and Fort Hood, JJ.

EARL H. ALLARD, JR.,

Plaintiff/Appellant,

vs

CHRISTINE A. ALLARD,

Defendant/Appellee.

Supreme Court No. 150891

COA No. 308194

Wayne Circuit Court
LC No. 10-110358-DM

PLAINTIFF/APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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ERRATA

Several pages of appellant's first brief referred to MCL 552.53. The brief contained a typographical error; that statutory section does not exist, and the references should have been to MCL 552.23.

ARGUMENT

I. THE STATUTES CAN BE WAIVED

Statements made at oral argument are not part of the record. Moreover, a judge who questions an attorney whether a marital estate can have "zero" value may or may not be expressing an opinion. This Court should not construe defense counsel's interpretation of an appellate judge's questions to constitute binding law.[1]

Defendant's brief largely repeats her Court of Appeals brief – issues on which defendant did not prevail, and did not file an appeal. By failing to file an appeal (or, in this case, a cross-appeal), defendant is unable to improve her position. No matter what rule this Court announces for future litigants, defendant may not obtain a decision more favorable to her than was rendered by the Court of Appeals. *Tyra v Organ Procurement Agency of Mich*, __ Mich __; __ NW2d __ (2015) (Docket No. 148079, decided July 22, 2015). Defendant's entire Issue III asserted improper issues not preserved by a cross-appeal, and was struck by order of this Court. Similarly, defendant uses her sections entitled "Contribution" and "Need" to repeat the

[1] Of course, there can be a marital estate of zero dollars the same way there can be a probate estate of zero dollars: through effective pre-planning.

arguments she raised at the Court of Appeals and attempt anew to appeal them to this Court (pages 28-32 of defendant's brief). She was aggrieved by the Court of Appeals' rejection of those theories, and did not bring an appeal.

A. The *Staple* case does not help defendant

Defendant suggests a statute can be waived only if expressly waived in an antenuptial agreement, and cites *Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000). In *Staple*, a conflicts panel agreed that parties could waive MCL 552.28 and make alimony final, binding, and non-modifiable. That court summarized its holding as follows:

> we adopt a modified approach that allows the parties to a divorce settlement to clearly express their intent to forgo their statutory right to petition for modification of an agreed-upon alimony provision, and to clearly express their intent that the alimony provision is final, binding, and thus nonmodifiable. Of course, MCL 552.28 creates a statutory right in either party to seek modification of alimony. However, like many other statutory and constitutional rights, parties may waive their rights under MCL 552.28. If the parties to a divorce agree to waive the right to petition for modification of alimony, and agree that the alimony provision is binding and nonmodifiable, and this agreement is contained in the judgment of divorce, their agreement will constitute a binding waiver of rights under MCL 552.28. In brief, we opt to honor the parties' clearly expressed intention to forgo the right to seek modification and to agree to finality and nonmodifiability. [241 Mich App at 568.]

The Court of Appeals in *Staple* did not hold that the statute must be expressly cited by number; rather "[w]ithout prescribing any 'magic words,' we hold that to be enforceable, agreements to waive the statutory right to petition the court for modification of alimony must clearly and unambiguously set forth that the parties (1) forgo their statutory right to petition the court for modification and (2) agree that the alimony provision is final, binding, and nonmodifiable." 241 Mich App at 581. There is no indication that the settlement in *Staple* used specific statutory language or citations.

Assuming *Staple* applies,[2] ¶ 5 of the antenuptial agreement specifically provides that "property division, or other rights or claims of any kind, nature, or description incident to marriage and divorce (including any right to payment of legal fees incident to a divorce), *under the present or future statutes and laws* of common law of the state of Michigan or any other jurisdiction (all of which are hereby waived and released)" [Appx 21a (emphasis added)]. This section of the antenuptial agreement shows the clear intent of the parties to waive property distribution under present or future statutes.[3]

The *Staple* Court also acknowledged that the alimony statute did not expressly permit its waiver, a characteristic of MCL 552.23 and MCL 552.401 discussed in appellant's principal brief. The Court of Appeals in *Staple* contrasted this with statutes that expressly forbid waiver, such as workers' compensation laws. 241 Mich App at 574-575.

B. Piercing the corporate veil is not a preserved or perfected theory

Defendant also insists that piercing the corporate veil is an appropriate procedure. Plaintiff reminds the Court that this issue was not contained in the trial court pleadings, discovery, testimony, or exhibits, nor was it presented to the Court of Appeals. There was no action to preserve the issue, and no record evidence to support it. To the extent "piercing the corporate veil" has any life in this case, it is due to the Court of Appeals' sua sponte reminder of the rules for piercing as part of its remand order.

[2] The Court expressly stated that its rule applied only to negotiated divorce settlements, 241 Mich App at 569.

[3] We need to be mindful that an antenuptial agreement may not become operative for years or decades, during which time statutes may change and other laws affecting marriage and divorce may evolve.

C. Other points

Although defendant reminds this Court that MCL 552.23 and 552.401 should be construed together and interpreted according to their clear language, she does not address the Legislature's use of the permissive word "may" in both statutes. She also does not address a distinguishing point on which the *Staple* court relied: the Legislature never indicated those statutes could not be waived.

Defendant's reliance on *Omni Financial, Inc v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999), is misplaced. In that decision, this Court ruled that the venue statute could not be waived by an agreement of the parties. In a split decision, that agreement was ruled unenforceable. The lead opinion held that the statute did not expressly allow its waiver and the agreement improperly reached beyond the private rights of the parties to bind the court system. 460 Mich at 313 (opinion of Kelly, J.). The concurring opinion held that the statute's transfer provision was non-discretionary ("shall"). 460 Mich at 318 (Corrigan, J., concurring). Again, the words "shall" and "may" have unique meanings not addressed by defendant. Under either view – neither of which commanded a majority – defendant's analogy fails.

Defendant mentions in passing that the divorce arbitration law, MCL 600.5070 (and specifically 600.5081(3)), would allow disregard of statutes. This confirms that the Legislature is not tied to the concept that MCL 552.23 and MCL 552.401 must be applied in every case – a conclusion buttressed again by the Legislature's use of the word "may" in both statutes.

II. THE RELEVANT ASSETS WERE NOT MARITAL PROPERTY

A. Ownership of LLCs was not an issue at trial or the Court of Appeals

Defendant argues the ownership of LLCs was properly preserved at the Court of Appeals and therefore was properly a part of the Court of Appeals' decision-making. Although the defendant (as appellant below) phrased her issue in broad terms, she did not argue in the brief that the LLCs were not in Mr. Allard's name and therefore should be excluded from the scope of the antenuptial agreement. Because it was not argued, it was abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("[i]t is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court").

The bigger argument, though, is defendant's position that the LLCs were formed during marriage and property acquired during marriage is presumed to be marital. This argument repeats the problem that has persisted in this case: her arguments are based on general divorce law, and fail to give the antenuptial agreement any weight whatsoever. Consistent with this approach, she argues that titling the LLCs in an individual name does not make it individual property – a position rejected by the signed agreement.

B. Defendant's new claims of ownership rights were not preserved

Defendant also offers the speculative argument that Mr. Allard had his wife sign away her dower rights on specific properties, so she must have been an owner. That position is contrary to the legal definition of dower (it is a future inchoate right, and does not mean land was titled in her name, *Cummings v Schreur (On Rehearing)*, 239 Mich 178, 180, 183; 214 NW 199 (1927)). More importantly, this case went through discovery and investigation and was tried in

open court. Defendant never presented any deeds (which are public records) designating her as a grantee to establish that she had a current ownership interest, or that any of the affected properties were titled in joint name.[4] Defendant also suggests, without proof, that income was commingled in the marriage and later used to finance the LLCs. She conceded at trial that she had no evidence that the assets were acquired with marital funds (Tr 8/17/2011 p 19, Appx 97a). The relevant inquiry under the antenuptial agreement was the titling of assets, a contractual presumption she has not overcome.

While defendant makes another grab at the LLCs, she argues that property fraudulently transferred to third parties can be brought back into the marital estate. This attempt to tailor the case after it has already been tried should fail. This Court's role is to guide the development of the law for the future – not to give the party who has already lost a new laundry list of suggested alternatives and a new trial in which to test them.

Finally, defendant admits the marital home was plaintiff's before marriage, but now says she is claiming only its appreciation in value under MCL 552.401(1). This request ignores her lack of proofs on any possible increase in the house's value at trial as well as the specific terms of the antenuptial agreement – most notably ¶ 5(a), Appx 21a:

> any increase in the value of any property . . . previously owned by either party shall remain the sole and separate property of that party.

Thus, even if defendant had preserved a claim for the increase in value of the marital home, the contract would defeat it.

[4] The trial court stated that "any of the properties that were acquired after they were married you can inquire about here as to how they were titled and *how they were conveyed* during the marriage, I'm going to allow that" (Tr 9/8/2011 pp 26-27, Appx 139a-140a (emphasis added)). Defendant was able to pursue these theories, but opted against it.

REQUEST FOR RELIEF

Plaintiff-Appellee Earl H. Allard, Jr., prays that this Court affirm the judgment of the circuit court and vacate that portion of the Court of Appeals' Opinion remanding the case for further proceedings.

Respectfully Submitted,

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